Shirley Kathreyn Yap v Malcolm Thwaites

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–19–03 OF 2015(W)
RAUS SHARIF PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, RAMLY ALI AND AZIAH ALI FCJJ
25 JULY 2016

Civil Procedure — Appeal — Facts, finding of — Interference by appellate court — Respondent's application for an accounting order — Whether trial judge erred in making an order for payment of specific sums of money not pleaded or prayed for — Whether trial judge ought to have dismissed respondent's claim when he abandoned his prayer for an accounting order — Whether trial judge erred in finding appellant to be accounting party retrospectively — Whether trial judge unilaterally introduced additional questions and given reliefs on matters which were not specifically pleaded — Whether Court of Appeal erred in upholding decision of trial judge — Whether there was any basis for equity to intervene to award equitable interest in appellant's properties to respondent — Whether Court of Appeal and High Court erred in their findings that unmarried person cohabiting in de facto husband and wife relationship could claim an equitable interest in properties

The appellant was married to the youngest son of a wealthy and prominent businessman in Penang until she left him some time in 1987. The appellant's husband was later found dead by hanging in the couple's matrimonial home. According to the respondent, a professional horse trainer, he had been intimately acquainted with the appellant before their marriage, and soon after she had left her husband the appellant had started cohabiting with the respondent in various places in Malaysia and Singapore for about 19 years. The respondent described his relationship with the appellant as that of a de facto husband and wife. The respondent claimed that during their 19 years of cohabitation he had made the appellant the registered manager of ten stables and the sole proprietor of the business he had set up. The respondent then filed an action against the appellant for an accounting of income generated from the horse racing partnerships, which was received by the appellant as the registered manager and nominee of the respondent as well as an equitable share of the properties purchased by the appellant by a constructive trust arising out of a long term cohabitation as de facto husband and wife. The appellant denied that her relationship with the respondent was a de facto husband and wife relationship but rather that of a boyfriend and girlfriend in cohabitation. It was the appellant's case that being emotionally distraught by the sudden death of her husband she had accepted the respondent's help and companionship.

Hence she submitted that she was not required to render any accounting to the respondent. The appellant also denied that she was financially dependent on the respondent, especially as she had inherited a substantial sum from her husband. The appellant thus argued that all the properties acquired in Malaysia, Singapore and Macau were purchased with her money and that the respondent had no legal or equitable interest in any of them. The appellant also claimed that it was the respondent, who was financially dependent on her due to having no substantial earnings of his own and living a lavish and extravagant lifestyle. The appellant thus counterclaimed against the respondent for various loans she had given to the respondent and also for payments made on his behalf for the upkeep of his horses in Australia. The trial judge found that the appellant was not an accounting party during the relationship but that she had become an accounting party retrospectively. After finding that the appellant had a duty to render an accounting to the respondent, the trial judge went on to order that the appellant pay the respondent a total sum of SGD$7,911,402 and a further sum of RM5,436,958, which she had received as the respondent's nominee in Singapore and Malaysia respectively. Thereafter by taking into account the respondent's cohabitation in a de facto husband and wife relationship with the appellant, the trial judge applied the approach taken in the case of *Aspden v Elvy* [2012] EWHC 1387 (Ch) ('*Aspden*'s case') to impose a constructive trust on the properties acquired in Malaysia, Singapore and Macau and to award a half share in those properties to the respondent. On appeal the Court of Appeal found that the appellant had failed to show that the decision of the trial judge was perverse or plainly wrong to justify appellate intervention. As such, the Court of Appeal dismissed the appellant's appeal. The appellant has obtained leave to proceed with the present appeal. In this appeal the appellant argued that as the respondent had not required the appellant to render any accounting during the period of their relationship, there was no duty to keep accounts or to account to the respondent. As such, the appellant contended that it followed that if no accounts were kept, there was no basis in law to make the appellant an accounting party with a duty to render an accounting retrospectively for the period of 16 years. In response the respondent argued that the appellant was in a fiduciary position when she received and agreed to receive monies as a registered manager of the respondent's business. By being in the fiduciary position the appellant had a duty to account to the respondent.

Held, allowing the appeal:

(1) The respondent had commenced the present action against the appellant because he wanted to ascertain whether any sum was due to him from the accounting. There was neither an express or implied agreement by the appellant to render accounting nor an undertaking by the appellant to act in a particular way so as to give rise to the duty of fiduciary. Strangely, although the respondent had sought an accounting order and had not

sought any specific sum, the trial judge had awarded the respondent judgment for the gross sum of the stake monies of SGD$7,911,402 and a further sum of RM5,436,958 in addition to a half share in the appellant's properties. As the respondent's pleaded case was for an accounting order, there was no basis for the trial judge to make an order for payment of a specific sum that was not pleaded or prayed for. Further, the respondent had abandoned his prayer for an accounting order. Under such circumstances the trial judge ought to have dismissed the respondent's claim. There was no cause of action left. Thus, the trial judge had erred in ordering the appellant to pay the total sum of SGD$7,911,402 and a further sum of RM5,436,958 on the grounds that the appellant was an accounting party (see paras 49–51 & 58–59).

(2) The trial judge had unilaterally introduced additional questions and given reliefs on matters which were not specifically pleaded by the respondent. This was not the duty of the High Court. The Court of Appeal, in turn, was clearly wrong in agreeing that the trial judge was correct to make specific orders under the general prayer and by upholding the decision of the trial judge to make the appellant an accounting party as well as to order retrospective accounting. Thus, based on the facts of this case, a person who was not an accounting party in a de facto husband and wife relationship could not be an accounting party to account retrospectively upon the termination of the said relationship (see paras 52–57).

(3) The respondent's claim for equitable interest in the appellant's properties was dependent on the results of the accounting order. Since the respondent had abandoned his prayer for accounting before the close of the trial, there was no basis for the respondent to assert that he had an equitable interest in the appellant's properties on the basis that his stake monies were being utilised to purchase the properties. As for the monies from winning bets, it had also been established that no monies were received by the appellant and consequently there was no basis for the respondent to assert that the appellant used such funds to purchase the properties. In any case, the gross amount of stake monies of approximately RM27.5m had already been fully accounted for. Thus there was nothing left of the stake monies to be traced to the appellant's properties. As such, the trial judge was precluded from making any further order for an equitable interest in the properties based on the same stake monies that had already been taken into account. Further, as the properties were not jointly owned or jointly purchased, there was no basis for equity to intervene to award an equitable interest in the properties. Thus, the trial judge had erred in ordering an equitable half share in all the appellant's properties (see paras 60–63 & 67–68).

(4) The Court of Appeal also erred in agreeing with the High Court and invoking equity to impose a constructive trust on the properties and by relying on *Aspden*'s case to support its decision. The facts and law propounded in *Aspden*'s case were distinguishable from the present case. Further, in *Aspden*'s case the decision was based on the common law principles in England. In Malaysia, the position of the law with regard to de facto relationship and cohabiting couple and unregistered marriage was quite different. It is settled law that after the Law Reform (Marriage and Divorce) Act 1976 came into force cohabiting couples were required to have their marriage registered in order to have any of their matrimonial rights recognised. In the circumstances there was no basis in law for the respondent, who was not married to the appellant, to claim an equitable interest in any of the appellant's properties acquired by the appellant during the period of their de facto relationship. The Court of Appeal and High Court had erred in their findings that an unmarried person, such as the respondent, cohabiting in a de facto husband and wife relationship with the appellant could claim an equitable interest in the properties (see paras 69–71 & 74–76).

[Bahasa Malaysia summary

Perayu telah berkahwin dengan anak lelaki bongsu kepada ahli perniagaan yang kaya dan terkenal di Pulau Pinang sehingga dia meninggalnya pada tahun 1987. Suami perayu kemudian didapati mati tergantung dalam rumah perkahwinan pasangan itu. Menurut responden, seorang pelatih kuda profesional, dia mempunyai hubungan intim dengan perayu sebelum perkahwinan mereka, dan sejurus selepas dia meninggalkan suaminya perayu telah mula bersekedudukan dengan responden di pelbagai tempat di Malaysia dan Singapura selama lebih kurang 19 tahun. Responden menggambarkan hubungannya dengan perayu sebagai suami dan isteri yang *de facto*. Responden mendakwa bahawa sepanjang 19 tahun mereka bersekedudukan dia telah membuat perayu pengurus berdaftar sepuluh kandang dan pemilik tunggal perniagaan yang ditubuhkannya. Responden kemudian telah memfailkan tindakan terhadap perayu untuk perakaunan pendapatan yang dijana daripada perkongsian lumba kuda, yang diterima oleh perayu sebagai pengurus berdaftar dan nomini responden dan juga bahagian yang saksama daripada hartanah yang dibeli oleh perayu oleh amanah konstruktif yang timbul daripada bersekedudukan jangka panjang sebagai suami dan isteri *de facto*. Perayu menafikan hubungannya dengan responden adalah hubungan suami isteri *de facto* tetapi sebaliknya seorang teman lelaki dan teman wanita yang bersekedudukan. Ia adalah kes perayu bahawa menjadi emosi tertekan akibat kematian mengejut suaminya dia telah menerima bantuan dan persahabatan responden. Justeru, dia berhujah bahawa dia tidak perlu dikehendaki untuk membuat apa-apa perakaunan kepada responden. Perayu juga menafikan bahawa dari segi kewangan dia bergantung kepada responden, terutama kerana dia telah mewarisi sejumlah besar daripada suaminya. Perayu itu berhujah

bahawa semua harta yang diperolehi di Malaysia, Singapura dan Macau telah dibeli dengan wangnya dan responden tidak mempunyai kepentingan undang-undang atau ekuiti dalam mana-mana daripadanya. Perayu juga mendakwa bahawa ia adalah responden, yang bergantung dari segi kewangan kepadanya kerana tidak mempunyai pendapatan besar sendiri dan hidup dengan gaya hidup yang mewah dan boros. Perayu dengan itu membuat tuntutan balas terhadap responden untuk pelbagai pinjaman yang telah diberikannya kepada responden dan juga untuk bayaran yang telah dibuat bagi pihaknya untuk pemeliharaan kudanya di Australia. Hakim perbicaraan mendapati bahawa perayu bukan satu pihak perakaunan sepanjang hubungan itu tetapi bahawa dia telah menjadi pihak perakaunan secara retrospektif. Selepas mendapati perayu mempunyai tanggungjawab untuk memberi perakaunan kepada responden, hakim perbicaraan itu terus memerintahkan supaya perayu membayar responden sejumlah wang sebanyak SGD$7,911,402 dan sejumlah wang tambahan sebanyak RM5,436,958 yang telah diterimanya sebagai nomini responden masing-masing di Singapura dan Malaysia. Selepas itu dengan mengambil kira keadaan bersekedudukan responden dalam hubungan suami isteri *de facto* dengan perayu, hakim perbicaraan telah menggunakan pendekatan yang diambil dalam kes *Aspden v Elvy* [2012] EWHC 1387 (Ch) ('kes *Aspden*') untuk meletakkan amanah secara konstruktif ke atas hartanah-hartanah yang diperoleh di Malaysia, Singapura dan Macau dan mengawardkan separuh bahagian dalam hartanah-hartanah tersebut kepada responden. Atas rayuan Mahkamah Rayuan mendapati bahawa perayu telah gagal menunjukkan bahawa keputusan hakim perbicaraan adalah tidak munasabah atau jelas salah untuk mewajarkan campur tangan pihak rayuan. Perayu telah memperoleh kebenaran untuk meneruskan rayuan ini. Dalam rayuan ini perayu berhujah bahawa oleh kerana responden tidak menghendaki perayu membuat apa-apa perakaunan sepanjang tempoh hubungan mereka, tiada kewajipan untuk menyimpan akaun atau untuk membuat akaun kepada responden. Oleh itu, perayu berhujah bahawa ia diikuti bahawa jika tiada akaun yang disimpan, tiada asas dari segi undang-undang untuk membuat perayu pihak perakaunan dengan kewajipan untuk membuat perakaunan secara retrospektif untuk tempoh 16 tahun. Sebagai jawapan responden berhujah bahawa perayu mempunyai kedudukan fidusiari apabila dia menerima dan bersetuju untuk menerima wang sebagai pengurus berdaftar untuk perniagaan responden. Apabila berada dalam kedudukan fidusiari sebegini perayu mempunyai kewajipan untuk membuat akaun kepada responden.

Diputuskan, membenarkan rayuan:

(1) Responden telah memulakan tindakan ini terhadap perayu kerana dia ingin memastikan sama ada apa-apa jumlah yang perlu dibayar kepada daripada perakaunan itu. Tiada persetujuan nyata atau tersirat oleh perayu untuk membuat perakaunan itu atau pun aku janji oleh perayu

untuk bertindak dalam cara tertentu agar menimbulkan kewajipan fidusiari. Peliknya, meskipun responden telah memohon perintah perakaunan dan tidak memohon apa-apa jumlah spesifik, hakim perbicaraan telah megawardkan responden penghakiman untuk jumlah kasar wang pegangan SGD$7,911,402 dan jumlah selanjutnya RM5,436,958 tambahan kepada separuh bahagian dalam hartanah perayu. Oleh kerana kes yang dipli oleh responden adalah untuk perintah perakaunan, tiada asas untuk hakim perbicaraan membuat perintah bagi bayaran jumlah spesifik yang tidak dipli atau dipohon. Selanjutnya, responden telah membiarkan permohonannya untuk perintah perakaunan. Di bawah keadaan sedemikian hakim perbicaraan patut menolak tuntutan responden. Tiada kausa tindakan lagi. Oleh itu, hakim perbicaraan terkhilaf dalam memerintahkan perayu membayar keseluruhan jumlah SGD$7,911,402 dan jumlah selanjutnya RM5,436,958 atas alasan bahawa perayu adalah pihak perakaunan (lihat perenggan 49–51 & 58–59).

(2) Hakim perbicaraan secara unilateral memperkenalkan soalan tambahan dan memberikan relief berhubung perkara-perkara yang tidak diplikan secara spesifik oleh responden. Ini bukan kewajipan Mahkamah Tinggi. Mahkamah Rayuan, sebaliknya, jelas terkhilaf dalam mempersetujui bahawa hakim perbicaraan adalah betul untuk membuat perintah spesifik di bawah permohonan am dan dengan mengesahkan keputusan hakim perbicaraan untuk membuat perayu satu pihak perakaunan dan juga untuk memerintahkan perakaunan secara retrospektif. Oleh itu, berdasarkan fakta kes ini, seseorang yang bukan satu pihak perakaunan dalam hubungan suami isteri *de facto* tidak boleh menjadi pihak perakaunan secara retrospektif setelah penamatan hubungan tersebut (lihat perenggan 52–57).

(3) Tuntutan responden untuk kepentingan saksama dalam hartanah perayu bergantung kepada keputusan perintah perakaunan. Oleh kerana responden telah membiarkan permohonannya untu perakaunan sebelum penutup perbicaraan, tiada asas untuk responden menegaskan bahawa dia mempunyai kepentingan saksama dalam hartanah perayu berdasarkan wang pegangannya digunakan untuk membeli hartanah tersebut. Berhubung wang daripada memenangi pertaruhan, ia juga telah dibuktikan bahawa tiada wang telah diterima oleh perayu dan akibatnya tiada asas untuk responden menegaskan bahawa perayu telah menggunakan dana tersebut untuk membeli hartanah tersebut. Dalam apa keadaan, jumlah kasar wang pegangan lebih kurang RM2.75 juta telahpun diambil kira. Oleh itu tiada apa yang tinggal untuk wang pegangan itu dikesan kepada hartanah perayu. Oleh itu, hakim perbicaraan telah dihalang daripada membuat apa-apa perintah selanjutnya untuk kepentingan saksama dalam hartanah tersebut berdasarkan wang pegangan sama yang telahpun diambil kira.

Selanjutnya, oleh kerana hartanah tersebut tidak dimilik bersama atau dibeli bersama, tiada asas untuk ekuiti campur tangan untuk mengawardkan kepentingan saksama dalam hartanah tersebut. Oleh demikian, hakim perbicaraan telah terkhilaf dalam memerintahkan separuh bahagian saksama dalam semua hartanah perayu (lihat perenggan 60–63 & 67–68).

(4) Mahkamah Rayuan juga terkhila kerana bersetuju dengan Mahkamah Tinggi dan menggunakan ekuiti untuk mengenakan amanah konstruktif ke atas hartanah-hartanah itu dan dengan bergantung kepada kes *Aspden* untuk menyokong keputusannya. Fakta dan undang-undang yang dibentangkan dalam kes *Aspden* berbeza daripada kes ini. Selanjutnya, dalam kes *Aspden* keputusan berdasarkan prinsip-prinsip common law di England. Di Malaysia, kedudukan undang-undang berhubung hubungan *de facto* dan pasangan bersekedudukan dan perkahwinan tidak berdaftar adalah agak berbeza. Ia undang-undang tetap bahawa selepas Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 berkuat kuasa pasangan bersekedudukan dikehendaki mempunyai perkahwinan mereka didaftarkan bagi tujuan mengiktirafkan apa-apa hak perkahwinan mereka. Dalam keadaan berikut tiada asas dari segi undang-undang untuk responden, yang tidak berkahwin dengan perayu, untuk menuntut kepentingan saksama dalam mana-mana hartanah perayu yang diperoleh oleh perayu sepanjang tempoh hubungan *de facto* mereka. Mahkamah Rayuan dan Mahkamah Tinggi terkhilaf dalam penemuan mereka bahawa orang yang tidak berkahwin, seperti responden, bersekedudukan dalam hubungan suami isteri *de facto* dengan perayu boleh menuntut kepentingan saksama dalam hartanah tersebut (lihat perenggan 69–71 & 74–76).]

Notes

For cases on finding of appeal facts, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1166–1308.

Cases referred to

Alcatel- Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investment Ltd and another appeal [2012] 4 MLJ 72, CA (refd)

Aspden v Elvy [2012] EWHC 1387, Ch D (distd)

Baboo Janokey Doss v Bindabun Doss [1843] Moore Ind App 175, PC (refd)

Bristol & West Buidling Society v Mothew [1998] Ch 1, CA (refd)

Cyril Sharpe, Re [1992] FCA 616, FC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Sivanes a/l Rajaratnam v Rani Usha a/p Subramaniam [2002] 3 MLJ 273, CA (refd)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd &

Ors and other appeals [1996] 2 MLJ 265, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976

Appeal from: Civil Appeal No W-02–1310–06 of 2013 (Court of Appeal, Putrajaya)

Ghazi bin Ishak (Ong Kheng Leong and Jeyasingam Balasingam with him) (Ghazi & Lim) for the appellant.

Chew Swee Yoke (Dhiren Norendra, Saroop Rampal and Tan Xiu Ying with him) (Norendra & Yap) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 7 July 2014 dismissing the appellant's appeal against the decision of the High Court.

[2] The High Court had on 21 May 2013 allowed the respondent's claim against the appellant for an accounting of income generated from the horse stable partnerships and payment of all monies due to the respondent in respect thereof, and equitable share of the properties by a constructive trust arising out of a long term cohabitation as de facto husband and wife.

[3] In this appeal we shall refer the parties as they were in the High Court. The appellant is the defendant while the respondent is the plaintiff.

[4] On 17 February 2015, this court granted the defendant leave to appeal on the following questions of law:

(a) whether a person who is not an accounting party in a de facto husband and wife relationship can be made an accounting party to account retrospectively upon the termination of the relationship ('first question'); and

(b) whether an unmarried party co-habiting in a de facto husband and wife relationship can claim equitable interest in a property that is not jointly purchased or jointly owned without any financial contribution ('second question').

BACKGROUND

[5] The plaintiff is a horse trainer by profession. He has during his professional life established for himself a reputation as a horse trainer in Asia making him a much sought after trainer.

[6] The defendant is a Company Director of Loh Kah Kheng Holdings Sdn Bhd. She was married to one Loh Kah Kheng ('LKK'), the youngest son, of Tan Sri Loh Boon Siew ('TSLBS') (since deceased). Before his demise TSLBS was a wealthy and prominent businessman in Penang and in Malaysia.

[7] According to the plaintiff, he and the defendant started seeing each other sometime in early 1970's, which was prior to the defendant's marriage to LKK. To the plaintiff, it was an intimate relationship which was denied by the defendant. To the defendant, the plaintiff was only a casual friend and the casual friendship ended when she left for United States of America ('USA') for work purposes.

[8] It is not in dispute that when the defendant returned to Malaysia from the USA, she got married to the late LKK. From the marriage, they were blessed with two children, a boy and a girl. They all lived in Penang.

[9] It is the plaintiffs case that in February 1987, the defendant together with the children left LKK. Soon after her departure, LKK was founddead by hanging in their matrimonial home. An inquest was conducted on the cause of death. At the conclusion of the inquest the coroner returned a verdict that LKK was murdered by an unknown person or persons.

[10] It is also the plaintiff's case that immediately after the defendant had left LKK, she started cohabiting with him in various places in Malaysia and Singapore for about 19 years. The plaintiff described the defendant as his one true love and soul mate, and treated their relationship as that of a de facto husband and wife.

[11] The defendant's case on this issue is slightly different. According to her, the demise of her husband was widely reported in the local media. She was emotionally distraught and was going through a tough spell in her life upon the sudden death of her husband. At that material time, the plaintiff who was then based in Ipoh, contacted her and offered his help and companionship to her. She accepted the offer and the plaintiff began to visit her. She described the plaintiff as a boyfriend and denied that the relationship was one of a de facto husband and wife.

[12] It is the plaintiff's case that during the 19 years of cohabitation, his reputation as a horse trainer was blooming, so much so he had accumulated enormous wealth from the winning of horses trained by him. The plaintiff in his business set-up, had made the defendant as his nominee. She was the registered manager of ten stables and sole proprietor of the business. As the nominee and registered manager, all the money from winnings from the horse racing were paid to her as required by the Malaysian Racing Association ('MRA').

[13] It is alleged that from the stake records of the Turf Clubs a large sum of money was received by the defendant between the period of 1987–2003. And it is also alleged that the defendant had used some of those monies to purchase numerous properties in Malaysia and overseas.

[14] Thus, in this suit, the plaintiff in his amended statement of claim, sought the following reliefs:

(a) an accounting of all monies of all income generated by various partnership registered in the defendant's name including all winnings in respect of the plaintiff's race horses and winning bets received by the defendant on trust for the plaintiff;

(b) payment of all monies due to the plaintiff based on the said accounting;

(c) an equitable share of the Country Heights house known as Lot 368, Jalan Pelangi Pagi, Country Heights, 43000 Kajang, Selangor, held in the defendant's name on a constructive trust for the plaintiff;

(d) an equitable share of the Macau properties purchased by the defendant in 2005 on a constructive trust for the plaintiff;

(e) a declaration that the loan of HK 2m for the Macau apartment was from the plaintiff's earnings from the racing partnership registered in the defendant's name;

(f) an equitable share of all assets acquired by the defendant using the earnings of the plaintiff from the above said partnership during the years from 1987–2006 and held under a constructive trust for the plaintiff;

(g) an order that the defendant pay the plaintiff the value of the BMW 3.5 Coupe car purchased by the plaintiff for the sum of RM300,000 and put in the defendant's name;

(h) interest at 8%pa on all sums due from the defendant to the plaintiff from the due date or date the cause of action arose as adjudicated by the court until date of payment; and

(i) costs.

[15] The defendant denied that she was required to render any accounting to the plaintiff and that was never an understanding between them. For the defendant the personal relationship between her and the plaintiff was one of a boyfriend and girlfriend relationship in cohabitation. She further denied that the relationship was a de facto husband and wife relationship and hence the question of constructive trust did not arise.

[16] In her defence, the defendant denied that she and her two young children were financially dependent on the plaintiff. It is her position that she was well to do being the daughter of a well-known and successful businessman, the wife of a millionaire, and also the daughter in law of a billionaire and that she had inherited a substantial fortune from her late husband.

[17] In fact, the defendant alleged that the plaintiff had no substantial earnings; that the plaintiff was in fact suffering financially, by, inter alia, living a lavish and extravagant lifestyle; that the defendant's role was that of a financier and lender of last resort to the plaintiff, that this has resulted in the plaintiff being not only financially dependent on her on a regular basis but also a financial burden on her as well, that this has resulted in the plaintiff having no assets to show after all these years.

[18] Further the defendant alleged that all the properties in dispute, namely the Country Heights House, the three properties in Singapore and the eleven Macau properties, were purchased with her money; and that the plaintiff has no legal or equitable interest in any of the said properties contrary to the plaintiff's claims.

[19] In fact, the defendant alleged that it was the plaintiff who was dependent on her financially. She further alleged that she had given nine loans to the plaintiff and had also paid on his behalf for the upkeep of his horses in Queensland, Australia.

[20] Thus, the defendant counterclaimed against the plaintiff for the following:

(a) a loan of USD910,000 being 65% of the purchase price advanced to the plaintiff on or about 25 August 2000 to purchase the horse 'Aristotle';

(b) a loan of SGD106,000 advanced to the plaintiff on or about September 2001 being the Dubai entry fee;

(c) a loan of USD100,000 advanced to the plaintiff on or about 5 March 2002 to purchase the horse from Equi Air;

(d) a loan of SGD11,627.20 advanced on 18 June 2002 to enable the plaintiff to purchase Koi fishes from Sakai Fish Farm Co Ltd of Japan;

(e) a loan of SGD55,000 advanced on 28 December 2003 for the plaintiffs end of month expenses when he was going to Macau;

(f) a loan of NZ$95,000 (equivalent to RM229,000) given to the plaintiff on 22 June 2004 to enable the plaintiff to purchase a horse;

(g) a loan of SG50,000 (equivalent to RM115,850) given to the plaintiff on 8 November 2004 to enable the plaintiff to purchase a house;

(h) a loan of RM100,000 which the defendant paid to the plaintiff's manager, Mr Leigh Me Kenzie; and

(i) a loan of HK$2m which was given to the plaintiff to purchase the Macau apartment.

[21] The defendant also claimed a sum Australian Dollars $51,323.80 which was detailed as follows:

(a) the sum of AUD$13,024 paid in 2006 on behalf of the plaintiff for the upkeep of the horses known as Ouzo and Fischer in Queensland;

(b) the sum of AUD$14,916 paid in 2007 on behalf of the plaintiff for the upkeep of the horses known as Ouzo and Fischer in Queensland;

(c) the sum of AUD $15,580.40 paid in 2008 on behalf of the plaintiff for the upkeep of the horses known as Ouzo and Fischer in Queensland; and

(d) the sum of AUD$7,803.40 paid in 2009 on behalf of the plaintiff for the period ending 30 June 2009 for the upkeep of the horses known as Ouzo and Fischer in Queensland.

AT THE HIGH COURT

[22] After a full trial, the learned High Court judge ('trial judge') allowed the plaintiff's claim and dismissed the defendant's counterclaim. The trial judge made the following orders:

(i) the defendant to pay the plaintiff the total sum of SGD $7,911,402 received in Singapore by the defendant as the nominee of the plaintiff and the total sum of RM5,436,958 received in Malaysia by the defendant as the nominee of the plaintiff;

(ii) a 1/2 share in the following properties:

(a) the Country Heights property known as No 368, Jalan Pelangi Pagi, Country Heights, 43000 Kajang, Selangor;

(b) the three apartments in Singapore known as No 6, St Martin's Drive, Singapore, No 3, St Martin's Drive, Singapore and No 1, King Albert Park, #06–15, 598326 Singapore; and

(c) eleven Macau properties as detailed below:

(i) Wan Yu Villas, Tingkat 6/F, Flat I;

(ii) Wan Yu Villas, Tingkat 9/F, Flat C;

(iii) Wan Yu Vilas, Tingkat 12/F, Flat I;

(iv) South East Asia Centre, Tingkat 17, Unit H;

(v) South East Asia Centre, Tingkat 17, Unit I;

(vi) South East Asia Centre, Tingkat 17, Unit T;

(vii) South East Asia Centre, Tingkat 17, Unit U;

(viii) South East Asia Centre, Tingkat 17, Unit L;

(ix) South East Asia Centre, Tingkat 17, Unit P;

(x) South East Asia Centre, Tingkat 17, Unit S; and

(xi) La Oceania Apartment, Unit 7/D (La Oceania Apartment, Unit 7/D was purchased by the company using the company's funds);

(iii) the sum of RM260,000 in respect of the purchase of a vehicle ie a BMW car bearing registration number PET 7;

(iv) interest at the rate of 5%pa on the judgment sum from the date of judgment until full realisation; and

(v) a global sum of RM250,000 as the costs of the action and the defendant's counterclaim.

[23] The trial judge also ordered, inter alia, the defendant to execute the relevant transfer papers in order to transfer into the plaintiff's name, a half share of all the properties listed in sub-paras (a) to (c) of para (ii) above, within 14 days from the date of service of the sealed copy of the order of the court on the defendant, failing which the deputy registrar or the senior assistant registrar of the Kuala Lumpur High Court would do so.

[24] The trial judge in deciding as she did acknowledged that the defendant was not an accounting party during the relationship but added that the defendant became an accounting party retrospectively. She said it in the following words:

> *In my judgment, based on the evidence adduced by both parties, there was an unequivocal understanding between the parties that the plaintiff would not require the defendant to account to him for the monies received by her in respect of the sole proprietorships and partnerships registered in her name. In other words, the plaintiff did not require the defendant to render any accounting of the stake monies and the winning bets. However, since the parties de facto husband and wife relationship has come to an end upon their break up and the business partnership between the plaintiff and*

A *defendant has been dissolved, the defendant has a duty to render an accounting to the plaintiff based on the defendant's previous relationship to the plaintiff as a fiduciary.* (Emphasis added.)

B **[25]** After finding that the defendant has a duty to render an accounting to the plaintiff the trial judge did not order the defendant to do so but ordered instead the defendant to pay the gross stake monies of S$7,911,402 received in Singapore and RM5,436,958 received in Malaysia without any accounting. The trial judge, in ordering the defendant to pay the said sum without any order for accounting, reasoned as follows:

C

> ... it is unlikely that the defendant would do so even if she was ordered by court to do so. Hence, it would be futile for the court to make such an order. In other words, it would not serve any purpose for the court to make such an order when the court knows that the defendant is not going to comply.

D

[26] To facilitate the payment of specific sums without any accounting, the trial judge introduced a new question after the conclusion of the trial. The additional question reads as follows:

E

> Whether the court ought to order the defendant to pay to the plaintiff the total sum of S$7,911,402 received by the defendant in Singapore and the total sum of RM5,436,958 received by the defendant in Malaysia.

[27] The trial judge then made a finding of fact that stake monies of SGD7,911,402 and RM5,436,958 were earned by the plaintiff during the period of 1987–2003. The trial judge relied on the letter from the MRA dated 11 August 2010 as well as the evidence of the MRA's secretary Mr Kumar ('PW10') that the stake monies were paid or collected by the defendant.

G **[28]** Thereafter, by taking into account that the plaintiff's cohabitation in a de facto husband and wife relationship with the defendant, the trial judge introduced another question which reads:

> Whether the court ought to order the defendant to transfer to the plaintiff a half share of the Country Heights property and half share of each of the three properties in Singapore and each of the eleven Macau properties, on the basis that the defendant held them as the constructive trustee of the plaintiff because there was a common intention between the parties to cohabit as de facto husband and wife from 1987–2006 when the plaintiff left the Country Heights home upon the breakdown of their common law marriage?

H

I

[29] The trial judge observed that there was a constructive trust based on the common intention and went on to liken the facts of this case to the facts in *Aspden v Elvy* [2012] EWHC 1387 (Ch) as follows:

> In my judgment, the facts of the instant case are similar to the facts in *Aspden v Elvy*.

Hence, in my respectful view, the same approach ought to the adopted in finding the common intention constructive trust based on inferred intention in favour of the plaintiff in respect of a half undivided share of the Country Heights property.

[30] As for the other properties the trial judge adopted a similar approach:

As for the other properties/assets acquired during the long term cohabitation of the parties, in view of the long term business partnership between the parties, the court ought to invoke equity to impose a constructive trust on the properties/assets and to convert the status of the defendant from that of a legal owner having the sole beneficial ownership in the properties/assets to one of a trustee in respect of an equitable share of the properties/assets in favour of the plaintiff.

[31] It was for those reasons that the trial judge awarded 1/4 share in the defendant's properties as claimed by the plaintiff.

AT THE COURT OF APPEAL

[32] The Court of Appeal in dismissing the defendant's appeal basically dealt with three core issues which were:

(a) is the appeal, an appeal purely on question of facts and is there any room for appellate intervention on accepted principles?;

(b) what was the nature of the relationship between the defendant and the plaintiff during the 19 years of cohabitation?; and

(c) if it is one of de facto husband and wife relationship, does the concept of constructive trust apply?.

[33] On the first issue, the Court of Appeal found that the trial judge's finding of facts was based on established evidence. The court noted that the defendant's evidence being the only witness for the defence is prima facie self-serving. Her case was made worse when she could not produce adequate documentary evidence to rebut the plaintiff's case. On the other hand, the Court of Appeal pointed out that the plaintiff's case was corroborated by witnesses whom the trial judge found to be credible. Thus, the Court of Appeal concluded that the defendant had failed to show to the court that the decision of the trial judge is perverse or plainly wrong to justify appellate intervention.

[34] On the second issue, the Court of Appeal found that the nature of the relationship between the plaintiff and the defendant during the 19 years of cohabitation was that of a de facto husband and wife. The Court of Appeal agreed with the findings of the trial judge that the plaintiff and the defendant had been living for all intents and purposes as husband and wife. It was found by the court that the trial judge's finding of facts on this issue was not based on

imaginary evidence but on the contrary she had weighed all the evidence in detail before her and made an informed decision.

[35] On the third issue of whether the concept of constructive trust applies to a de facto husband and wife relationship, the Court of Appeal again agreed with the trial judge that the facts in *Aspden v Elvy* were similar to the present case. Hence, based on *Aspden v Elvy* the Court of Appeal affirmed the decision of the trial judge in finding the common intention constructive trust based on inferred intention in favor of the plaintiff in respect of a half undivided share in the Country Heights property.

[36] As for the other properties/assets acquired during the long term cohabitation of the parties, in view of the long term business partnership between the parties, the Court of Appeal agreed with the trial judge in invoking equity to impose a constructive trust on the properties/assets and to convert the status of the defendant from that of a legal owner having the sole beneficial ownership in the properties/assets to one of trustee in respect of an equitable share of the properties/assets in favor of the plaintiff.

[37] In conclusion, the Court of Appeal found that the trial judge had not erred in her analysis of the law and had applied the correct law to the factual matrix. It was for those reasons the Court of Appeal found no reason to disturb the decision of the trial judge.

AT THE FEDERAL COURT

[38] As stated earlier, there are two questions of law posed to this court. We will deal with each question in turn.

First question

Whether a person who is not an accounting party in a de facto husband and wife relationship can be made an accounting party to account retrospectively upon the termination of the relationship.

[39] As stated earlier, the trial judge in her grounds of judgment acknowledged that the defendant was not an accounting party during the relationship but added that the defendant became an accounting party retrospectively upon the breakup of the relationship in 2006. In order to understand the submission of learned counsel for the defendant, we reproduce what the trial judge said:

> *In my judgment, based on the evidence adduced by both parties, there was an unequivocal understanding between the parties that the plaintiff would not require the*

defendant to account to him for the monies received by her in respect of the sole proprietorships and partnerships registered in her name. In other words, the plaintiff did not require the defendant to render any accounting of the stake monies and the winning bets. However, since the parties de facto husband and wife relationship has come to an end upon their break up and the business partnership between the plaintiff and defendant has been dissolved, the defendant has a duty to render an accounting to the plaintiff based on the defendant's previous relationship to the plaintiff as a fiduciary. (Emphasis added.)

[40] It was submitted by learned counsel for the defendant that, the plaintiff in the amended statement of claim did not plead (a) that the defendant agreed to be an accounting party; or (b) that the defendant was an accounting party; or (c) that the defendant had a duty to account. Thus, it was argued that when the plaintiff did not require the defendant to render any accounting during the period of relationship then there was no duty to keep accounts or to account to the plaintiff and consequently no account was kept. It follows that if no accounts were kept, there is no basis in law to make the defendant an accounting party with a duty to render an accounting, retrospectively, for the period of 16 years. This is especially so when the trial judge had found that during the period of 16 years there was an unequivocal understanding between the parties that the defendant had no duty to account to the plaintiff.

[41] Learned counsel for the plaintiff submitted otherwise. It was argued that the defendant was in a fiduciary position when she received and agreed to receive stakes monies paid by the various Turf Clubs to her as a registered manager. According to learned counsel, it is settled law that a person in a fiduciary position is always required to account.

[42] Thus, the issue before us is whether the trial judge was right in finding that the defendant has a duty to account to the plaintiff. In *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investment Ltd and another appeal* [2012] 4 MLJ 72 ('*Alcatel*') the trial judge had made a finding of a fiduciary and an accounting party when these were not pleaded in the statement of claim. The Court of Appeal in allowing the appeal, observed that:

> for there to exist a complete cause of action for taking accounts, the respondent has to plead and prove the following:
>
> (a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent as the plaintiff; and
>
> (b) the appellant (as the defendant) is an accounting party to the respondent (as the plaintiff).

[43] The Court of Appeal in *Alcatel* also held that:

A The learned judge had gone beyond the pleaded case when he made a finding that the appellant was an accounting party because of an alleged fiduciary relationship between the appellant and the respondent when this was neither pleaded nor proven.

B **[44]** On appeal by *Solid Investments Ltd* the Federal Court dismissed the appeal and affirmed the decision of the Court of Appeal. The question of law posed before the Federal Court was as follows:

Whether in asserting whether parties stand in a fiduciary relationship a court is to C have regard to the course of dealings between the parties in addition to any express agreement between them.

[45] In resolving the said question of law in the affirmative, the Federal Court observed with approval that the Court of Appeal had extensively dealt D with the law relating to the duty to account under the common law as stated, inter alia, in *Baboo Janokey Doss v Bindabun Doss* [1843] Moore Ind App 175, *Re Cyril Sharpe* [1992] FCA 616 and *Bristol & West Buidling Society v Mothew* [1998] Ch 1

E **[46]** In *Baboo Janokey Doss v Bindabun Doss,* Dr Lushington of the Privy Council at p 197 said:

... we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything to be found.

F A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due.

It is a Decree affirming his rights, only leaving it to be inquired into, how much is G due to him from the party accounting.

[47] In *Re Cyril Sharpe,* the Federal Court of Australia through Drummond J opined:

H The taking of an account is only appropriate once it is established that the parties involved are in an accounting relationship with each other, that is, only once it has been established that one party is liable to pay to the other anything that is found, on the taking of account, to be due to that other ...

I **[48]** In *Bristol and West Building Society v Mothew* at p 18, Millet LJ made the following observation on the question of law as who is a fiduciary:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence ...

[49] Similarly, in the present case, there was no express or implied agreement by the defendant to render accounting. There was also no undertaking by the defendant to act in a particular manner so as to give rise to the duty of fiduciary. Further, the plaintiff had not asserted or claimed any right to be paid a specific sum as he had not pleaded that any sum was due to him. The plaintiff in his witness statement and in his evidence in court, stated that he had commenced the action because he wanted to ascertain whether any sum was due to him from the accounting. Strangely, although the plaintiff had only sought an accounting order and had not sought any specific sum, the trial judge had awarded the plaintiff judgment for the gross sum of the stake monies of SGD7,911,402 and RM5,436,958 in addition to a 1/2 share in the defendant's properties.

[50] We are of the view there was no basis for the trial judge to make an order for payment of specific sum that was not pleaded or prayed for. As stated earlier, the plaintiff's pleaded case is for an accounting order. However, the plaintiff at the end of the trial abandoned his prayer for an accounting. This can be seen from the trial judge ground of judgment which reads:

> At the conclusion of the trial, the plaintiff abandoned his prayer in para 60(a) of his ASOC for an accounting of income generated from the various horse racing partnership which was received by the defendants as trustee for the plaintiff as the registered manager and nominee of the plaintiff.

[51] Under such circumstances, we are of the view that the trial judge after having found that the plaintiff had abandoned his prayer for an accounting, ought to have dismissed the plaintiff's claim. There was no cause of action left. Thus, the trial judge was in error in ordering the defendant to pay the plaintiff the total sum of SGD$7,911,402 allegedly received by the defendant in Singapore and RM5,436,958 received in Malaysia on the ground that the 'defendant had a duty to render an accounting to the plaintiff based on the defendant previous relationship as a fiduciary' and that the defendant was 'an accounting party'.

[52] We are also of the view that the Court of Appeal, in upholding the decision of the trial judge, had erred by expanding on the reasons given by the trial judge by reasoning as follows:

> ... An order for accounting on the part of the appellant would be hard to enforce and it would be best in the interest for all that she made specific orders ...

[53] On this issue, we would like to refer to what was said by the Federal Court in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, where the court held, inter alia, that:

A we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and its not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not B pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[54] This is what had actually happened in this case. The trial judge had C unilaterally introduced additional questions and given reliefs on matters which were not specifically pleaded by the plaintiff. Unfortunately, the Court of Appeal agreed that the trial judge was entitled to grant reliefs, even though the reliefs were not pleaded, under the general prayer for 'Any other relief deemed suitable by the honorable court'. The Court of Appeal was of the view that the D said general prayer is not a prayer without any meaning and the trial judge was correct to make specific orders under the general prayer.

[55] With respect we disagree. On the facts and circumstances of what was E pleaded by the plaintiff in his amended statement of claim and in light of the plaintiffs statement given during trial that he was not seeking payment of specific sum but only an accounting of gross stake money, the Court of Appeal was clearly wrong in making such an interpretation on the general prayer of 'Any other relief deemed suitable by the honorable court'.

F

[56] Based on the above, it is our judgment that the Court of Appeal was in error in upholding the decision of the trial judge to make the defendant an accounting party and to order retrospective accounting from 1987–2003. This is especially so when the trial judge had found that there was an unequivocal G understanding between the parties that the plaintiff would not require the defendant to account to him for the monies received by her in respect of the sole proprietorship and partnership registered under her name, as well as the stake monies and the winning bets during his relationship with the defendant.

H **[57]** Thus, based on the facts of this case, we would answer the first question in the negative. A person who is not an accounting party in a de facto husband and wife relationship cannot be an accounting party to account retrospectively upon the termination of the said relationship.

I **[58]** In any event, we are also of the view that the order of the trial judge that the defendant to pay SGD$7,911,402 and RM5,436,958 to the plaintiff cannot stand in light of their absence in the pleading and from the evidence

adduced in this case which was unfortunately not taken into consideration by the trial judge. It is our observation that the trial judge had failed to take into consideration the following:

(a) the expenditure listed by the defendant at para 29 of the amended defence and counterclaim, which is the annual personal expenditure of the plaintiff in the sum of RM595,200. As the duration of the partnerships as stated by the plaintiff under para 22 of the amended statement of claim is 16 years from 1987–2003, the aggregate total annual expenditure for 16 years adds up to the sum of RM9,523,200 (RM595,200 x 16). No explanation was given as to why these sums were not deducted from the gross stake monies;

(b) during the trial, the plaintiff gave evidence of his alleged cohabitation expenses in his additional answer to question 13A that 'By estimate, I spent about RM80,000–RM100,000 per year for a period about ten years for the maintenance of the defendant and her children including taking them for overseas holidays'. As the duration of the partnerships as stated by the plaintiff under para 22 of the amended statement of claim is 16 years (1987–2003), the aggregate total annual expenditure for 16 years is the sum of RM1.6m (RM100,000 x 16). If the calculation is based on the period of the relationship from 1987–2006 = 19 years, the sum would be RM1.9m (RM100,000 x 19). No explanation has been given as to why even this lower sum of RM1.6m was not deducted from the gross stake monies;

(c) it is to be noted that under the first limb of the judgment the plaintiff was awarded, inter alia, the sum of SGD$7,911,402 although he was just 1/3 shareholder of the stables known as Eres Tu No 2 stables a sizeable part of the Singapore stake monies. The fact that the plaintiff was a minority shareholder of 1/3 shares is confirmed at para 22(b) of the amended statement of claim as follows: 'Partnership known as Eres Tu No 2 Stables registered around 1993–1994 with three partners namely the defendant as the manager, one Tan Peng Quee and the plaintiff'. No evidence was adduced at the trial by the plaintiff that Tan Pen Quee had not been paid and that he was authorised to sue on behalf of Tan Peng Quee. Yet, the plaintiff was paid the full stake monies of Tan Peng Quee as well as that of the defendant;

(d) the defendant had enclosed copies of 204 cheques aggregating the sum of Singapore dollars SGD$1,814,124.32 being withdrawals and disbursements of stake monies paid to the plaintiff, the plaintiff's company named Thwaites Racing Pte Ltd, the plaintiff's partner Tan Peng Quee and other expenses of the plaintiff's entities. The trial judge did not deduct the said sum from the total stake monies awarded. No explanation has been given as to why the defendant was not allowed to

deduct the sum of SGD$1,814,124.32 that was withdrawn by the plaintiff, his partner and his entities; and

(e) the defendant at the trial had tendered a summary accounting. The summary accounting showed that after deduction of expenses admitted by the plaintiff in his pleadings and further payments evidenced in the 204 cheques, there was a net deficit of RM5.4m due from the plaintiff. The trial judge made no reference to the summary accounting in the grounds of judgment and completely ignored this deficit of RM5.4m.

[59] Thus, even from the evidence adduced, which was not considered by the trial judge, there is absolutely no basis for the trial judge to make an order that the defendant to pay the plaintiff the sum of SDG$7,911,402 and RM5,436,958 to the plaintiff.

Second question

Whether an unmarried party co-habiting in a de facto husband and wife relationship can claim an equitable interest in a property that is not jointly purchased or jointly owned without any financial contribution?

[60] It is clear in this case that the plaintiff was asking for an account of his stake monies and also to ascertain, inter alia, whether any of the stake monies could be traced to the defendant's properties to claim an equitable share. This is stated in the plaintiffs answer to question 5 of his witness statement which read as follows:

Q: Please describe the nature of your suit against the defendant?

A: *I am demanding for an accounting of stake monies* (horse's winnings) collected by the defendant as my nominee and as registered manager of the stables for which I was a partner of and also those stables of which I was not a registered partner but of which she was my nominee (hereinafter called collectively as 'my business'). *I am also asking for verification whether any of my funds were used to purchase properties that were bought in her name and others such as her daughter Loh Wei Lyn and also Loh Kah Kheng Holdings Sdn Bhd ('LKK Holdings*). (Emphasis added.)

[61] It is clear from the above, the plaintiff's claim for equitable interest in the defendant's properties was dependent on the results of an accounting as pleaded under para 60(a) of the amended statement of claim. However, as pointed earlier the plaintiff had at the end of the trial, abandoned his prayer for an accounting. Thus, with no accounting to verify whether any stake monies were used to purchase the defendant's properties, there was no basis for the

plaintiff to assert that he had an equitable interest in the defendant's properties on the basis that his stake monies were being utilised to purchase the properties.

[62] As for the monies from winning bets, it was also established that no monies were received by the defendant and consequently no basis for the plaintiff to assert that the defendant used such funds to purchase the properties. This can be seen in the questions posed by the trial judge and the plaintiff's answer as follows:

> PW2: Trainer's bonuses issued by various turf clubs, money I made being successful better on my horses, commissions from sale of horses to clients, usually about 10%, gifts which we loosely term as lucky money from grateful owners, my share of stake money in partnerships in which the defendant was not the Manager.
>
> YA: Just a moment to cut, we just stop you there and just ask you. Now, these gifts from grateful owners.
>
> PW2: Yes, My Lady.
>
> YA: And it is given to you in what form?
>
> PW2: 99% of the time in cash.
>
> YA: In cash?
>
> PW2: Yes.
>
> YA: Yeah. And it would range from what amount to what amount? Varying amounts from as little as how much?
>
> PW2: From as little ...
>
> YA: To as much as how much?
>
> PW2: From as little as 2,000 Ringgit up to maybe 40 or 50,000 Ringgit.
>
> YA: Now are where would you usually put these gifts? Would they be handed over to you personally or to someone else on your behalf?
>
> PW2: Normally, I would receive it personally but ...
>
> YA: You would receive it personally and?
>
> PW2: Nor ... normally.
>
> YA: Normally.
>
> PW2: Yes.
>
> YA: And where would you keep this money?
>
> YA: In your pocket? Yeah. And it stays in your pocket until you have spent all of them? I don't know what happens.
>
> PW2: Yes. As I've said before I'm not a very good keeper of
>
> money and that's why I was very happy ...

YA: No. Now I'm asking you ...

PW2: Yes.

YA: You know, I'm asking you about those monies. I'm just trying to trace these monies. So they go into your pocket and then from your pocket where do they go to?

PW2: Normally into payments for ... for things or into a bank account.

YA: Or to a bank account?

PW2: Yes.

YA: Yeah. Now this a bank account what sort of bank account would it be? Would it be your sole bank account? Would it be your joint bank account? Or is it a business account? What ... what bank account is that?

PW2: Some would be into a fixed deposit.

YA: Into a bank account. All right. It goes into a bank account. Who pays those money into the bank account?

PW2: *Into, if it were into a bank account per se, it would be my own personal bank account so it would ...*

YA: Own personal bank account and who pays this, who actually goes to the bank to pay the money ...

PW2: Deposit.

YA: Into the bank account?

PW2: *Either myself or my office staff.* (Emphasis added.)

(PW2 is the plaintiff. YA is the trial judge.)

[63] From the above, it is clear that the monies from the winning bets that the plaintiff received were deposited into his own personal account.

[64] Thus, from the above there is no basis for the plaintiff to demand that the defendant should account to him for the winning bets to ascertain if he had an equitable interest on the suspicion that the defendant had used his winning bets to purchase the properties.

[65] We are also of the view that there was double accounting under the second limb of the judgment based on the same stake monies as claimed by the plaintiff. Learned counsel for the plaintiff sought to highlight to us that the second limb of judgment was based on other incomes garnered by the plaintiff apart from the stake monies. But we are left in further quandaries as at the outset we have highlighted that the plaintiffs claim here is for an accounting of stake monies, being the horses' winnings collected by the defendant as the

plaintiff's nominee and as the registered manager of the stables for which he was a partner of and also those stables of which he (the plaintiff) was not a registered partner but of which the defendant was his nominee. Flowing from this the plaintiff had sought verification whether any of these funds were used to purchase properties that were bought in the defendant's name and others such as her daughter, Loh Wei Lyn and Loh Kah Khen Holdings Sdn Bhd.

[66] From our understanding the funds the plaintiff is referring to would have to be his stake monies alone. And an accounting was requested for the stake monies. The plaintiff explained that his claim for an accounting was to ascertain if he possibly had an equitable claim on the defendant's properties based on his stake monies. Further, the plaintiff also clarified through his counsel that he was not seeking any specific sum but merely an accounting of how the gross stake monies of approximately RM27.5m was utilised. This was clarified by the plaintiff's counsel during cross-examination as follows:

> Gl: You're making a claim of 21m?
>
> PW2: Can you show me the page and paragraph, please?
>
> CSY: My Lady, we're not claiminp that amount. If he, if My Learned Friend looks at the paragraph carefully, he was asking for an accounting and that is just an estimate based on what he's saying that MRA has given him.

(Gl is the defendant's counsel. PW2 is the plaintiff. CSY is the plaintiff's counsel.)

[67] It is apparent from the answers given above, that the plaintiff had no evidence, and consequently made no assertion, of any direct contribution of funds towards the purchase of the defendant's properties. It is also apparent, from the answers, which the plaintiffs claim for an equitable interest in the defendant's properties was dependent on, and lay solely on, the results of an accounting. Thus, we fail to see how the trial judge could have apportioned 1/2 shares in the defendant's properties even without first ordering an account to be made by the defendant of the plaintiff's stake monies. More so as stated earlier that the plaintiff at the end of the trial had abandoned his prayer for an accounting.

[68] As stated earlier, having found that the plaintiff had abandoned his prayer for an accounting, there was no cause of action left and the trial judge ought to have dismissed the plaintiff's case. Further, with no accounting to verify whether any stake monies were used to purchase the defendant's properties, there was no basis for the plaintiff to assert that he had an equitable interest in the defendant's properties on the basis of his stake monies being utilised. Further, it is to be noted that, under the first limb of the judgment, the

gross amount of stake monies of approximately RM27.5m were fully accounted for. Thus, there was nothing left of the stake monies to be traced to the defendant's properties.

[69] That being the case, the trial judge was precluded from making any further order for an equitable interest in the properties based on the same stake monies that had already been taken into account under the first limb of the judgment. Further, as the properties were not jointly owned or jointly purchased, there was also no basis for equity to intervene to award an equitable interest in property that was not jointly purchased or jointly owned without any evidence of financial contribution from the plaintiff. Thus, we are of the view that the trial judge erred in ordering an equitable 1/2 share in all the defendant's properties stated in the amended statement of claim to be transferred to the plaintiff without any accounting or proof of any financial contribution.

[70] As stated earlier, the Court of Appeal agreed with the trial judge to award 1/2 share in the defendant's properties and also agreed that the facts in *Aspden* were similar and concluded that the trial judge had applied the correct law to the factual matrix. Based on *Aspden* the Court of Appeal affirmed the decision of the trial judge in finding the common intention constructive trust based on inferred intention in favor of the plaintiff in respect of a half undivided share in the Country Heights property. As for the other properties/assets acquired during the long term cohabitation of the parties, in view of the long term business partnership between the parties, the Court of Appeal agreed with the High Court in invoking equity to impose a constructive trust on the properties/assets and to convert the status of the defendant from that of a legal owner having the sole beneficial ownership in the properties/assets to one of trustee in respect of an equitable share of the properties/assets in favor of the plaintiff.

[71] With respect we disagree with the view expressed by the trial judge and as affirmed by the Court of Appeal. We find that the facts and the law propounded in *Aspden* are distinguishable from the present case. In *Aspden,* both parties contributed their labor to improving the barn and there was proof of the substantial financial contributions made by the man towards the costs of conversion work estimated by him amounting to $73,000 while the woman put the figure at $39,000. Due to the fact that substantial financial contributions were made by the man, the court said the proper inference to be drawn from the whole course of dealing with the parties was that there had been a common intention for the man should have some interest in the barn as the result of the substantial contributions made to the conversion works. And because there had been no express discussion as to the value of the man's interest, it was necessary to impute an intention by reference to what was fair

having regard to the whole course of dealing between the parties. In those circumstances the court decided there, that an appropriate, if somewhat arbitrary, fair assessment of the man's interest was 25% which represented a fair return for the investment of $65,000 to $70,000 for the work carried out by him.

[72] In *Aspden,* the decision was based on the common law principles in England. In Malaysia, the position of the law with regard to de facto relationship and cohabiting couple and unregistered marriage is quite different. It is settled law that after the Law Reform (Marriage and Divorce) Act 1976 came into force cohabiting couples were required to have their marriage registered in order to have any of their matrimonial rights recognised. This is because unregistered couples or cohabitants could not and do not have any right to claim a share of their partner's assets on the basis of cohabitation and consequently the division of any asset or matrimonial property were matters strictly within the realm of lawfully married couples.

[73] In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265, the Court of Appeal stated, inter alia, as follows:

> In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case solely by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the *English courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society*.
>
> Accordingly, on grounds of public policy, this court will not extend the doctrine to those non-marital relationships alluded to by Lord Browne-Wilkinson in the passage quoted above. Our refusal to act in such cases is based upon the policy consideration that refusing to accede to such an extension may deter a fall in the moral standards of our society (see pp 309–310). (Emphasis added.)

[74] Similarly, in *Sivanes a/l Rajaratnam v Rani Usha a/p Subramaniam* [2002] 3 MLJ 273, the Court of Appeal stated in obiter, the legal position of unmarried persons and cohabitants, as follows:

> I am of the view that the courts in this country should not treat such a relationship as in *Dennis v McDonald* [1981] 2 All ER 632 as a 'matrimonial relationship' There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between. A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after the coming into force of the Law Reform (Marriage and Divorce) Act 1976 is monogamous ...
>
> ...

> I have no objection to the principle in *Dennis v McDonald* [1981] 2 All ER 632 being applied in this case provided it is understood that, *I am in no wav recognising a 'live in' relationship as a 'matrimonial relationship' with rights and obligations provided by law to a married couple, no matter how many children they may have together. In other words, the principle in Dennis v McDonald should not, in this country, be applied to unmarried couples. If a couple chooses not to get married as provided by our law, they should not be talking about a 'matrimonial relationship', 'matrimonial home', 'conjugal rights', 'matrimonial proceedings' or 'division of matrimonial assets'. Those terms are exclusively for lawfully married couples in accordance with our laws.* (Emphasis added.)

[75] We agree with the above statements of law as expounded by the Court of Appeal in the two cases. We would like to add that the intention behind the Law Reform (Marriage and Divorce) Act 1976 was clearly not to provide reliefs in respect of unregistered marriages, unless a claim by one party against the other can be sustained on a cause of action not arising from the impugned relationship.

[76] Based on the above, we are of the view that there was no basis in law for the plaintiff, who was not married to the defendant, to claim an equitable interest in any of the defendant's properties acquired by the defendant during the period of their de facto relationship. This is especially so when there was no proof of any financial contribution but based solely on the de facto relationship. The trial judge and the Court of Appeal judges were in error in finding that an unmarried person, like the plaintiff co-habiting in a de facto husband and wife relationship with the defendant could claim an equitable interest in the properties that was not jointly purchased or jointly owned without proof of financial contribution.

[77] We therefore answer the second question in the negative. Under our law an unmarried party co-habiting in a de facto husband and wife relationship cannot claim an equitable interest in a property that is not jointly purchased or jointly owned without any proof of financial contribution.

[78] In any event, there is more than sufficient evidence to show that the defendant has the means to purchase the properties which the trial judge and the Court of Appeal failed to consider. This is probably because the courts were persuaded by learned counsel for the plaintiff's submission that 'the appellant contrary to her allegations had in fact no wealth of her own at the relevant time due to the acrimonious relationship between her and her now deceased father-in-law, the late Tan Sri Loh Boon Siew who had effectively blocked her access to her deceased husband Loh Kah Keng's estate'. But the courts below failed to take into account what was said at para 15 of the amended statement of claim which the plaintiff states:

When Tan Sri Boon Siew died in 1995 the probate matter was resolved as the defendant became the executor as a reason of her being the natural mother of the beneficiary children of the estate.

[79] And at para 16 of the amended statement of claim the plaintiff states that:

On becoming the executor of the late husband's estate and trust, the defendant also came into control of substantial funds in the value of RM 600m.

[80] It is not in dispute that the purchases of the properties were all made after 1995 when the defendant came into control of substantial funds as stated by the plaintiff in the amended statement of claim. The dates of purchases as stated in the amended statement of claim at para 32(a) (year 2005 in respect of the Macau properties) and para 33 of the amended statement of claim (year 2001 and later, in respect of the Singapore and other properties). Thus, to hold that the defendant had no means to purchase the properties is contrary to the plaintiff's amended statement of claim and the evidence adduced by the defendant.

CONCLUSION

[81] For the above reasons, we allow the appeal with costs. The decisions of the High Court and Court of Appeal are therefore set-aside. In the result, the plaintiffs claim against the defendant is dismissed.

Appeal allowed.

Reported by Kohila Nesan